IN THE

SUPREME COURT of the UNITED STATES

October Term, 1976

No. 76-127

CARMEN ACS, Administratrix of the Estate of Santiago Lazaro, Decceased,

Appellant,

vs.

RICHARD BRADY,

Appellee.

On Appeal From The Indiana State Supreme Court

MOTION TO DISMISS

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The Appellee moves the Court to dismiss the appeal herein on the following grounds:

1. This appeal does not present a substantial Federal question;
2. The Federal question sought to be reviewed was not expressly passed on in this case.

I. HISTORY OF THE CASE

The Appellant herein sued to recover damages for the death of her decedent who was killed while a "guest passenger" in the Appellee's automobile. The Indiana Guest Statute (set forth in the Appellant's Jurisdictional Statement, p. 3) denies guest passengers (non-paying passengers) recovery, for personal injury or death, against the host unless the host was guilty of wanton or wilfull misconduct.

The Trial Court held the Guest Statute unconstitutional and directed a verdict for the Plaintiff (Appellant herein) on the issue of liability on the basis of simple negligence.

The Defendant (Appellee herein) appealed to the Indiana Supreme Court. In such appeal, Appellee moved for consolidation with the pending appeals of *Dempsey v. Leonherdt*, ... Ind ..., 341 NE 2d 763 (1976) and *Sidle v. Majors*, ... Ind. ....., 341 NE 2d 763 (1976). The Motion to Consolidate was denied.

In those cases, (set forth in the Jurisdictional Statement, Exhibit A), decided February 16, 1976, the Indiana Supreme Court held the Guest Statute to be constitutional. On March 4, 1976, the Indiana Supreme Court reversed the Trial Court in this case. It's decision was based on its earlier holding in *Dempsey v. Leonherdt*, supra. It stated:

"(1) The issue raised by this appeal has been resolved by our disposition of the identical issue in *Dempsey v. Leonherdt* (Green), Ind., 341 N.E. 2d 763 handed down February 16, 1976. In that case, we upheld the guest statute against federal and state constitutional challenges of denial of due process and equal protection of the law."

Brady v. Acs, ... Ind. ....., 342 N. E. 2d 837, (1976)

Thus, the constitutional issues were not decided in our case. What the Appellant herein is attempting to do, in fact, is to appeal the decision in *Demsey v. Leonherdt*, supra., wherein this Appellee was not a party, and which has not been appealed to this Court. *1

II. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

In *Silver v. Silver*, 280 US 117, 50 S. Ct. 57, 74 L. Ed. 221 (1929), this Court held that a Guest Statute, virtually indentical to the Indiana Statute concerned herein. did not violate the United States Constitution. It stated:

> "The use of the automobile as an instrument of transportation is peculialy the subject of regulation.... We are not unaware of the increasing frequency of litigation in which passengers carried gratuitously in automobiles, often casual guests or licensees, have sought the recovery of large sums for injuries alleged to have been due to negligent operation... Whether there has been a serious increase in the evils of vexatious litigation in this class of cases, where the carriage is by automobile

*1 Counsel for the Appelant (plaintiff below) herein was also Counsel for the Plaintiff in *Dempsey v. Leonherdt*.

is for legislative determination and, if found, may well be the basis of legislation further restricting the liability. Its wisdom is not the concern of Courts."

Silver v. Silver, 280 U.S. at 122-123
74 L Ed at 229

This Court has recently dismissed two appeals which attempted to raise the same issues as Appellant does herein, i. e. the constitutionality of state automobile Guest Statutes, on the grounds that there was no substantial Federal question.

Cannon v. Oviatt, ... Utah .....,
520 P2d 883, (1974) App. Dismissed
419 U.S. 810, 42 L Ed 2d 37,
95 S. Ct. 24 reh. den., 419 U.S. 1060
42 L Ed 2d 658, 95 S Ct. 645

White v. Hughes
257 Ark 627, 519 SW2d 70, (1975)
App. Dismissed ..... U.S. .... ,
46 L. Ed 2d 26 ..... S Ct. .....

III. THERE IS NO SUBSTANTIAL QUESTION AS TO DUE PROCESS.

Appellant attempts to make a due process argument by contending that the Guest Statute creates an "irrebuttable presumption that every 'Guest Case' will lower the quantum of hospitality in the state, will involve collusion, and will raise insurance premiums." (Jurisdictional Statement, p. 17) This argument is (specious). The Statute creates no presumption, re buttable or otherwise. It may be based on a legislative opinion that guest cases have such undesirable effects.

But, the statute does not create any presumptions and does not deny due process of law. It simply modifies the common law remedy for negligence in the automobile guest situation to reduce the degree of care. This is not unconstitutional.

"... the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object."

Silver v. Silver, supra.
280 U.S. at 122
74 L. Ed. at 225

"... negligence is merely the disregard of some duty imposed by law and the nature and extent of the duty may be modified by legislation with corresponding change in the test of negligence."

N.Y. Central R. Co. v. White
243 U.S. 188, 198
61 L. Ed. 667,
37 S. Ct. 247, 250 (1917)

By enacting the Guest Statute, the Legislature has simply modified the nature and extent of the duty, i. e. the standard of care, owed by an automobile host to his non-paying guest. This does not violate the Due Process Clause of the United States Constitution. Duly enacted legislation *is* Due Process of Law.

IV. THERE IS NO SUBSTANTIAL QUESTION AS TO EQUAL PROTECTION

Appellant also contends that the Statute unlawfully discriminates against a class of persons, i. e. vehicle passengers who are non-paying guests of the driver. Appellant's argument is that there is no rational connection between payment for the ride and any legitimate governmental purpose.

Appllant also argues that, if there was such a rational connection when the statute was originally enacted (1929), it no longer exists because of changed social conditions.

A. *The Test.* The standard of review is wether or not the legislative classification is reasonable and bears a fair and substantial relation to a legitimate government purpose.

Johnson v. Robison
415 U.S. 361, 94 S. Ct. 1160,
39 L. Ed 2d 389 (1974)

Reed v. Reed . .
404 U.S. 71, 92 S. Ct. 251
30 L. Ed. 2d 225 (1971)

In *Dandridge v. Willaims*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970) this Court said:

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made

by its laws are imperfect. If the classification has some "reasonable basis" it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 55 L. Ed. 369, 377, 31 S. Ct. 337. "The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70, 57 L. Ed. 730, 734, 33 S. Ct. 441. "*A statutory discrimination will not be set aside if any state of of facts reasonably may be conceived to justify it discrimination will not be set aside if any state o facts reasonably may be conceived to justify it.*" *McGowan v. Maryland*, 366 U.S. 420, 426, 6 L. Ed. 2d 393, 399, 81 S. Ct. 1101."

(25 L. Ed. 2d at 501-502, Emphasis added)

B. *The Classification is Reasonable.* The class created by the statute in this case, is guests who are being transported in motor vehicles without payment therefor. I. C. 9-3-3-1 (Jurisdictional Statement, p. 3).

The distinction made by the statute between paying and non-paying passengers is inherently reasonable. What is arbitrary or capricious about saying that one who pays for a service or accommodation is entitled to a higher duty of care than one who receives its gratuitously. In *Railway Express Agency, Inc. v. People of the State of New York*, 366 U.S. 106, 69 S. Ct. 463, 93 L. Ed 533 (1949) Justice Jackson (concurring) stated:

"Certainly the presence or absence of hire has been the hook by which much highway regulation has been supported." (69 S. Ct. at 468)

In *Massaletti v. Fitzroy*, 228 Mass. 487, 118 N.E. 168 (1917) the Supreme Court of Massachussetts arrived at the same rule of law as is legislatively created by the Guest Statute in holding that a gratuitous passenger could not recover from his host except on proof of "gross negligence" as opposed to mere negligence.

Justice Arterburn, concurring in *Dempsey v. Leonherdt*, supra, did so on the basis of the common law distinction which imposed a higher duty of care on a paid bailee, such as a warehouseman or carrier, than on a gratuitous bailee. There is nothing irrational in using payment as the basis of distinction.

C. *The Guest Statute Has a Relationship to a Legitimate Goverment Purpose.* If there is any conceivable purpose to justify the statutory classification, the act must be upheld.

Dandridge v. Williams, supra
McGowan v. Maryland
366 U.S. 420 81 S. Ct. 1101
6 L. Ed 2d 393

In *Dempsey v. Leonherdt*, supra the Indiana Supreme Court mentioned three likely purposes that the legislatur may have been seeking to promote. They are: (1) the protection and promotion of hospitality, (2) the elimination of collusive or vexatious lawsuits, and (3) the protection of liability insurors. The first two purposes have been recognized in virtually all of the cases in which Guest Statutes have been upheld. The third is equally logical.

Most of the Appellant's argument herein, and indeed the rationale of those cases in which Guest Statutes were struck down, is that the means utilized, i. e. denial of a right of action for negligence, are unsuited to accomplish the purpose. Or, that other means might accomplish it better. What the Appellant is seeking to do is have the Court review the wisdom of the legislature. But that is not the function of the Court in an Equal Protection case.

> "Its (the legislation) wisdom is not the concern of the Courts."
>
> *Silver v. Silver*, supra

As a matter of fact, what could be more reasonable than to place the added burden on the guest. The occupant of another car has no opportunity to control the host driver or to protect himself. The guest passenger is uniquely situated in that respect. If the host is driving unsafely, the guest can protest, or even abandon the vehicle. What is unreasonable about requiring him to do so. If the guest knows he can't recover except for gross misconduct, isn't he likely to be more motivated to exercise precautions to prevent an injury? We submit that this is a sufficient legislative purpose in itself.

Appellant's argument that times have changed so that the legislative determination made in 1929 is no longer valid is erroneous. The great increase, both in motor vehicles and in liability insurance, only makes the Guest Statute more

meaningful. The obsolesence argument is especially inappropriate in the case of the Indiana Statute. The encouragement of hospitality has current validity and vitality a legislative purpose in Indiana.

In the 1975 session of the Indiana General Assembly, a bill was introduced to repeal the Guest Statute, being House Bill 1107. It was defeated 62 to 34. Thus. the enactment in question must be regarded as current legislation. In view of the fact that it was considered and voted upon last year, the opponents of the Guest Statute cannot rationally contend that: "Times have changed," or "That the circumstances which existed when it originally passed, no longer exist."

Let us instead look at the times and circumstances when it was last under consideration by the legislature.

In February, 1975, the legislature met in the aftermath of what was the Country's first and worst fuel crisis since World War II. In the previous year, this Country had suffered an oil embargo from the oil producing contries of the Middle East. The result was shortages of fuel throughout the Country. Many and varied efforts were made to conserve energy and reduce the consumption of fuel. Filling stations closed on weekends. In some parts of the Country, they were compelled to close during the week. The filing stations,

in some instances, limited their sales to ten (10) gallons per person. In some areas of the Country, there were long lines at filling stations on the certain days when fuel was available. Millions were spent, and are being spent, in search of new reservoirs of fuel. Additional millions are being spent in search for ways to conserve the use of fuel, such as by utilizing solar energy.

In 1974 the speed limit was reduced nationwide to 55 miles per hour. Fuel rationing was seriously considered and ration books were printed by the Federal Government.

During the crisis, government agencies and public service groups constantly and vociferously urged the public to form car-pools and to "share the ride", as was done during World War II. They are still doing so. All of these circumstances and considerations were very much in the minds of the legislature and the miuds of the public when the legislature met in 1975.

The court must assume that when the legislature was in session and considered repeal of the Guest Statute, it was aware of the recent cases in other states holding similar statutes unconstitutional. It must have been aware of the reasoning upon which they had ruled. Presumably, also, it was aware of the numerous states which had upheld Guest Statutes. But, by far the most important circumstances of which the legislature had to be aware was the need in this country to find means for the conservation of fuel. One of these means, long

recognized and advocated, was to share the ride by carpooling and otherwise.

Let us consider the logical effect of the provisions of the Guest Statute. Isn't it obvious that an automobile owner protected by the Statute would be more willing to sharing the ride, such as by driving a carpool to and from work? The Courts have judicially noticed the fact that most automobile owners have liability insurance. This is one factor which has been advocated as destroying the rationality of distinguishing between automobile hosts and other social hosts. (See Jurisdictional Statement, p. 8) But the fact is, that the availability of such insurance does not make an automobile owner all that carefree about carrying others. The Court must also judicially know that in the event claims are made against him by injured passengers, and settlements made or judgment awarded against him, which the insurance carrier has to pay, the host is faced with an increase in premium or cancellation of such insurance. Once he has suffered cancellation, it is both difficult and more expensive for him to obtain insurance for some period of time in the future. There is also the prospect of having a judgment in excess of his insurance limits which he himself would have to pay. The removal of these prospects cannot help but be a strong motovation encouraging him to carry passengers and help the conservation of fuel. We cannot see how this reasoning can be seriously disputed.

Thus, it is apparent that there is a legitimate government purpose to be effcted, and that such purpose was one of those which had to be foremost in the minds of the legislature when it rejected the bill to repeal the Guest Statute. It is also clear that the provisions of the Guest Statute bear a rational relationship to fulfillment or promotion of the governmental purpose. Therefore, the classification of automobile hosts and guests is a reasonable one, and the Statute does not violate the Equal Protection clause of the United States Constitution.

V. CONCLUSION AND PRAYER FOR RELIEF

The constitutionality of the Indiana Guest Statute was not expressly decided in this case. The decision was made in Dempsey v. Leonhardt which was not appealed.

There is no substantial Federal question presented by this appeal. The Guest Statute creates a reasonable classification which bears a rational relation to a legitimate governmental objective.

WHEREFORE, Appellee prays that this appeal be

dismissed and for all other proper relief.

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